

DANIEL E. LUNGREN
Attorney General

State of California
DEPARTMENT OF JUSTICE



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April 23, 1997

Allan Abshez
Irell & Manella
1800 Avenue of the Stars, Suite 900
Los Angeles, California 90067-4276

RE: Mancuso v. Calif. State Coastal Conservancy, et al.
LASC No. BS 040197

Dear Mr. Abshez:

Enclosed please find a copy of draft 4 of the Settlement Agreement.

As we discussed on April 18th, the Conservancy staff has not seen this draft and I have not discussed the concepts in it with them. In the interests of time, I have created this draft and sent it to you so that we would have a document on which to base our further discussions. It represents my understanding of how a document blending our two positions should look.

Sincerely,

DANIEL E. LUNGREN
Attorney General

A handwritten signature in dark ink, appearing to read "Peter H. Kaufman", written over the typed name and title.

PETER H. KAUFMAN
Supervising Deputy Attorney General

Enclosure

SETTLEMENT AGREEMENT

I.

PARTIES

This settlement agreement is made by and among the State Coastal Conservancy (hereinafter "Conservancy"), the Department of General Services (hereinafter "Department"), the Mountains Recreation and Conservation Authority (hereinafter "Authority"), Donohue Wildman (hereinafter "Wildman") and Frank Mancuso, Sr. (hereinafter "Mancuso") and their Related Entities^{1/}

II.

EFFECTIVE DATE

The effective date of this Agreement is the date on which it is last executed by a party to this Agreement.

III.

DESCRIPTION OF DISPUTE

This Agreement is made with reference to the following facts:

1. The Conservancy is the owner of a recorded approximately 10 foot wide non-exclusive easement which permits the public the right to pass and repass across the real property located at

1. For purposes of this Agreement, "Related Entities" shall be defined as Mancuso and Wildman's predecessors, successors, assignees, administrators, legal representatives, joint venturers, partners, agents, members, attorneys, officers, directors, employees, shareholders, affiliates, associates, parent entities, subsidiary entities (whether or not wholly owned), and their officers, directors, employees, shareholders and affiliates, and any other representative of Mancuso.

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27910 and 27920 Pacific Coast Highway, Malibu, Los Angeles County, California from Pacific Coast Highway to the mean high tide line of the Pacific Ocean. (A copy of that recorded easement is attached hereto and incorporated by reference herein as Exhibit A, hereinafter the "Easement".)

2. Mancuso is the owner of the real property located at 27920 Pacific Coast Highway.

3. Wildman is the owner of the real property located at 27910 Pacific Coast Highway. This property is burdened with a recorded offer to dedicate a portion of the property for public parking purposes. (A copy of that recorded offer to dedicate is attached hereto and incorporated by reference herein as Exhibit B, hereinafter the "Offer".)

4. Mancuso has filed a petition for writ of mandate (Los Angeles Superior Court No. BS 040197, hereinafter the "Action"). This action seeks a writ commanding the Conservancy to set aside a May 16, 1996 decision approving the expenditure of funds for a study of the cost of making the physical improvements necessary to allow the public to pass from Pacific Coast Highway along the Easement to the mean high tide line of the Pacific Ocean.

5. Mancuso alleges in the Action that the Conservancy in rendering this decision violated his due process rights, statutory notice requirements and the provisions of the California Environmental Quality Act (hereinafter "CEQA"). The Action also seeks to set aside a Conservancy decision approving

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the expenditure of funds for a 20 year property management agreement between the Conservancy and the Authority for management of the Easement on grounds the decision was improperly noticed and failed to properly comply with CEQA. Last, the Action alleges that the Conservancy and the Department failed to comply with Public Resources Code section 31107.1.

6. The Conservancy, the Authority and the Department deny that any of their actions described in paragraphs 3 and 4 supra violated Mancuso's due process rights, any statutory rights to notice or any provision of CEQA. The Conservancy and the Department, likewise, deny that they have in any way violated the provisions of Public Resources Code section 31107.1.

7. Notwithstanding the existence of this dispute between the Conservancy, the Authority, the Department and Mancuso regarding the allegations in the Action, all parties ^{2/} to this Agreement wish to reach a full and final settlement of all matters, causes of action and claims which have been raised or which could have been raised, now or in the future, and which arise out of the facts set forth in paragraphs III. 1 through 6 of this Agreement and nothing contained herein shall be construed as an admission of liability by any party nor of the validity of any claims or contentions which have been made or which could be

2. Wildman has not been named in the action described in this Agreement, however, he believes that if the dispute is not resolved he, too, will become involved in litigation with the Conservancy, the Department and the Authority.

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have been made.

IV.

TERMS OF THE AGREEMENT

The parties to this Agreement, in consideration of the mutual covenants and agreements to be performed, as set forth below, agree as follows:

1. Within ten (10) days of the execution of this Agreement, Mancuso shall provide counsel for the Conservancy, the Department and the Authority with a fully executed request for dismissal with prejudice of the Action in the form of the document attached hereto and incorporated by reference herein as Exhibit C:

2. Upon receipt of the executed request for dismissal with prejudice, the Conservancy shall file the dismissal with the Clerk of the Superior Court of Los Angeles County and shall provide Mancuso with a conformed copy of that dismissal.

3. The Conservancy shall complete a study of the cost of constructing the physical improvements necessary to allow the public to move from Pacific Coast Highway to the mean high tide line on the Easement (hereinafter "Improvements").

4. No later than December 19, 1997, the Conservancy shall determine whether the benefits of public use of the Easement are outweighed by the cost of constructing and maintaining the Improvements to the Easement.

5. If the Conservancy concludes that the benefits of

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public use of the Easement outweigh the cost of constructing and maintaining the Improvements, neither party shall have any further obligations under this Agreement.

6. If the Conservancy concludes that the benefits of public use of the Easement do not currently outweigh the cost of constructing and maintaining the Improvements, the Conservancy staff shall study what alternative access programs could be adopted currently to provide the same or better public access benefits in Malibu than the Easement.

7. Upon completion of the alternative access program study and no later than January 31, 1998, the Conservancy shall determine whether a \$978,000.00 private contribution in combination with other public funds would enable it to create an alternative access program which provides the same or better public access benefits in Malibu than the Easement.

8. If the Conservancy finds that, with a \$978,000.00 private contribution in combination with other public funds, no alternative access program could be adopted currently to provide the same or better public access benefits in Malibu than the Easement, the parties shall have no further obligations under this Agreement.

9. If the Conservancy determines that a \$978,000.00 private contribution in combination with other public funds would enable it to create an access program which provides the same or better public access benefits in Malibu than the Easement, then

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the parties shall take the following actions:

a. Within twenty (20) days of the date of the Conservancy determination described in this paragraph, Mancuso and Wildman shall deliver to the Executive Officer of the Conservancy an irrevocable letter of credit from an institution acceptable to the Conservancy in the sum of \$60,000.00. Said letter of credit shall be subject to the laws of the State of California, shall be automatically renewed every five years and shall be due and payable to the Conservancy upon the bank's receipt of a declaration under penalty of perjury from the Executive Officer of the Conservancy stating that the Conservancy received a letter from Mancuso requesting termination of this Agreement. (A copy of the form of that letter of credit is attached hereto and incorporated by reference herein as Exhibit D.)

b. Within twenty (20) days of the date of the Conservancy determination described in this paragraph, Mancuso and Wildman shall deliver to the Executive Officer of the Conservancy an irrevocable letter of credit from an institution acceptable to the Conservancy in the sum of \$100,000.00. Said letter of credit shall be subject to the laws of the State of California, shall be automatically renewed every five years and shall be due and payable to the Conservancy upon the bank's receipt of a declaration under penalty of perjury from the Executive Officer of the Conservancy stating that litigation had been commenced against the Conservancy as a result of the Conservancy having

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entered into this Agreement and that the Conservancy received a letter from Mancuso requesting termination of this Agreement. (A copy of the form of that letter of credit is attached hereto and incorporated by reference herein as Exhibit E.)

c. Within thirty (30) days of the date it receives said letters of credit, the Conservancy shall submit to the California Coastal Commission an application for approval of the following:

- i. Relinquishment of the Easement;
- ii. Transfer of the balance of the Black Tor Account into an endowment account to be used by the Conservancy to implement the above described alternative access program;
- iii. Transfer of \$82,000.00 in the Coastal Commission's Malibu Access Account into the endowment account to be used by the Conservancy to implement the above described alternative access program.

d. Within thirty (30) days of its receipt of said letter of credit, the Conservancy shall submit to the Director of General Services a request for approval to relinquish the Easement;

e. Within thirty (30) days of the date the Conservancy makes the determination described in this paragraph, Wildman shall submit an application to the California Coastal Commission to amend coastal development permit No. 81-35 to delete the condition requiring the Offer; and

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f. Within thirty (30) days of the date the Conservancy makes the determination described in this paragraph, Mancuso, in conjunction with the current beneficiary of the Coastal Development Permit No. 5-89-1197 (Black Tor), shall submit an application to the California Coastal Commission to amend condition 1(b) to that permit to permit the Conservancy to apply the funds in the Black Tor account to the development and maintenance of public accessways in areas of Malibu apart from Escondido Beach.

10. Within thirty (30) days of the date the Department approves relinquishment of the Easement and the California Coastal Commission has approved permits:

- (i) authorizing relinquishment of the Easement;
- (ii) authorizing transfer of the balance in the Black Tor account into an endowment account to be used in conjunction with the \$978,000.00 provided by Mancuso to open and maintain accessways in Malibu;
- (iii) authorizing transfer of \$82,000.00 in the Malibu Access account into said endowment account;
- (iv) authorizing amendment of permit No. 81-35 to delete the permit condition requiring the Offer;
- and
- (v) authorizing deletion and substitution of condition 1(b) to Coastal

Development Permit No. 5-89-1197
with a condition enabling the
Conservancy to apply the funds in
the Black Tor account to the
development and maintenance of
public accessways in areas of
Malibu apart from Escondido Beach,

the Conservancy shall by letter give notice to Mancuso and
Wildman of those facts and designate the entity to whom Mancuso
and Wildman shall pay the sum of \$978,000.00. Unless prohibited
from doing so by a court order, within thirty (30) days of the
date that letter is sent by certified mail, Mancuso and Wildman
shall, by cashier's check, pay to the entity identified in the
above mentioned written notice, the sum of \$978,000.00. If
either the Department or the California Coastal Commission denies
the request or applications described above, the parties shall
have no further obligations under this Agreement and the
Conservancy shall, within thirty (30) days of such denial return
the letters of credit described in paragraph IV. 9 (a) & (b) to
Mancuso and Wildman. If the California Coastal Commission or the
Department fail to approve the request and applications described
above by January 31, 2000, the parties shall have no further
obligations under this Agreement and the Conservancy shall, by
February 10, 2000, return the letters of credit described in
paragraph IV. 9 (a) & (b) of this Agreement to Mancuso and

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Wildman.

11. Unless prohibited from doing so by a court order, no later than thirty (30) days after the California Coastal Commission has issued the permits described in paragraph IV. 10 above and after the \$978,000.00 is deposited by the entity identified in the above mentioned written notice, the Conservancy shall provide Mancuso with a quitclaim deed conveying to him the Easement burdening his property. (A copy of the form of that deed is attached hereto and incorporated by reference herein as Exhibit F.) Within the same period of time, the Conservancy shall provide Wildman with a quitclaim deed conveying to him the Easement burdening his property. (A copy of the form of that deed is attached hereto and incorporated by reference herein as Exhibit G.) In the event, a final judgment by a court of competent jurisdiction precludes: (a) the Conservancy from conveying these deeds; or, (b) the California Coastal Commission from issuing the permits described in paragraph IV. 10 of this Agreement; or, (c) the Department from approving conveyance of the Easement, then, within thirty (30) days of the date it receives written notice of said judgment, the Conservancy shall return the \$978,000.00 plus any accrued interest to Mancuso and Wildman and the parties shall thereafter have no further obligations under this Agreement.

12. Notwithstanding any other provision of this Agreement, should Mancuso and Wildman fail to pay \$978,000.00 in

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accord with the provisions of this Agreement, in addition to any other remedies the Conservancy might have for such a breach of this Agreement, Mancuso and Wildman hereby acknowledge that the Conservancy is entitled to reimbursement by Mancuso and Wildman for its expenses incurred as a result of having entered into this Agreement in the amount of \$60,000.00 if no litigation has been commenced against the Conservancy as a result of its having entered into this Agreement. If litigation has been commenced against the Conservancy as a result of its having entered into this Agreement, Mancuso and Wildman hereby acknowledge that the Conservancy is entitled to reimbursement by Mancuso and Wildman for its expenses incurred as a result of having entered into this Agreement in the amount of \$160,000.00. Said sums constitute liquidated damages, which the parties agree is a reasonable sum considering all the circumstances existing on the date of this Agreement, including the relationship of the sum to the range of harm to the Conservancy that reasonably could be anticipated and the anticipation that proof of actual damages would be costly or inconvenient. In placing their initial below, each party specifically confirms the accuracy of the statements made above and the fact that each party was represented by counsel who explained the consequences of this liquidated damages provision at the time this Agreement was made. The letters of credit described in paragraph IV. 9 (a) & (b) of this Agreement may be utilized to satisfy these obligations of Mancuso and Wildman.

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Mancuso and Wildman also expressly acknowledge that in the event they fail to pay the \$978,000.00 as required by this Agreement neither Mancuso nor Wildman shall use the existence of this Agreement or any decision or action or the evidence supporting that decision or action of any state or local agency including, but not limited to, the Conservancy, the Commission or the Department resulting from this Agreement as a basis for seeking judicial or administrative relief against the construction of improvements of any kind within the Easement.

Mancuso initials Wildman initials Conservancy initials

13. In the event the contingencies necessary to permit payment of the \$978,000.00 have not occurred by January 31, 2,000, then, upon the written request of Mancuso and Wildman or the Conservancy, this Agreement may be terminated. Should Mancuso and Wildman request that the Agreement be terminated, Mancuso and Wildman hereby acknowledge that the Conservancy is entitled to reimbursement by Mancuso and Wildman for its expenses incurred as a result of having entered into this Agreement in the amount of \$60,000.00 if no litigation has been commenced against the Conservancy as a result of its having entered into this Agreement. If litigation has been commenced against the Conservancy as a result of its having entered into this Agreement and Mancuso and Wildman request termination after January 31,

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2000, Mancuso and Wildman hereby acknowledge that the Conservancy is entitled to reimbursement by Mancuso and Wildman for its expenses incurred as a result of having entered into this Agreement in the amount of \$160,000.00. Said sums constitute liquidated damages, which the parties agree is a reasonable sum considering all the circumstances existing on the date of this Agreement, including the relationship of the sum to the range of harm to the Conservancy that reasonably could be anticipated and the anticipation that proof of actual damages would be costly or inconvenient. In placing their initial below, each party specifically confirms the accuracy of the statements made above and the fact that each party was represented by counsel who explained the consequences of this liquidated damages provision at the time this agreement was made. The letters of credit described in paragraph IV. 10 of this Agreement may be utilized to satisfy these obligations of Mancuso and Wildman. In addition, should Mancuso and Wildman request that the Agreement be terminated, Mancuso and Wildman also expressly acknowledge that they shall not use the existence of this Agreement or any decision or action or the evidence supporting that decision or action of any state or local agency including, but not limited to, the Conservancy, the Commission or the Department resulting from this Agreement as a basis for seeking judicial or administrative relief against the construction of improvements of any kind within the Easement. Should the Conservancy determine to

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request termination of this Agreement, it shall return the letters of credit described in paragraph IV. 9 (a) & (b) of this Agreement to Mancuso and Wildman.

Mancuso initials Wildman initials Conservancy initials

14. It is acknowledged and agreed by the parties that paragraphs IV. 3 through 9 refer to certain decisions and actions of the Conservancy by specific dates and that paragraph IV. 10 refers to decisions and actions of the California Coastal Commission and the Department. It is further acknowledged and agreed by the parties that notwithstanding the Conservancy's obligation under this Agreement to make a decision by a specific date, nothing in this Agreement compels the Conservancy, the Commission or the Department to make a decision in any particular way and that each such decision constitutes an exercise of the independent discretion of the Conservancy, the Commission and the Department under the laws of the State of California.

V.

MUTUAL RELEASES

1. The parties agree that upon filing of the dismissal with prejudice of the Action, all claims and causes of action of any nature whatsoever whether known, unknown, suspected or unsuspected, contingent or fixed arising out of the facts set forth in paragraphs III. 1 through 6 of this Agreement shall be

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released, relieved and discharged.

2. The parties expressly understand that California Civil Code section 1542 provides as follows:

"A general release does not extend to claims which the creditor does not know or suspect exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

The parties knowingly, voluntarily, intentionally, and expressly waive any and all rights and benefits conferred by section 1542 and agree and acknowledge that this waiver is an essential term of this Agreement, without which the consideration given herein would not have been given.

3. The parties acknowledge that there is a risk that subsequent to the execution of this Agreement, they, or any of them, may discover, incur, or suffer claims or damages which were unknown or unanticipated at the time this Agreement was executed, including, without limitation, unknown or unanticipated claims or damages that in any way related to or arise out of or are connected in any way with the matters or events which were, or could have been, alleged in the Action which if known by them on the date of the execution of this Agreement, may have materially affected their decision to execute this Agreement. The parties expressly assume the risk of such unknown and unanticipated claims and damages and agree that these releases apply to all

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such claims and damages.

VI.

REPRESENTATIONS AND WARRANTIES

1. Independent Legal Advice: Each of the parties represents, warrants and agrees that it has received independent legal advice from its attorneys with respect to the advisability of executing this Agreement.

2. No Other Representation: Each of the parties represents, warrants, and agrees that in executing this Agreement it has relied solely on the statements expressly set forth herein. Each of the parties further represents, warrants and agrees that in executing this Agreement it has placed no reliance whatsoever on any statement, representation or promise of any other party or any other person or entity not expressly set forth herein or upon the failure of any other party or any other person or entity to make any statement, representation or disclosure of anything whatsoever. The parties have included this clause: (i) to preclude any claim that any party was in any way fraudulently induced to execute this Agreement and (ii) to preclude the introduction of parol evidence to vary, interpret, supplement or contradict the terms of this Agreement.

3. Factual Investigation: Each of the parties represents, warrants and agrees that it has made such investigation of the facts that in any way relate to or arise out of or are connected in any way with the matters or events which were, or could have

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been alleged in the Action as it deemed necessary or desirable.

4. No Assignment: Each of the parties represents and warrants that there has been no assignment, transfer, or subrogation of any interest in any claims or causes of action which are the subject matter hereto and which are released by that party pursuant to this Agreement. The parties agree to indemnify and hold each other harmless from any liabilities, losses, claims, demands, costs and expenses (including, but not limited to, attorney fees) incurred by them as a result of any person or entity, including, but not limited to, underwriters and insurance carriers asserting such assignment, transfer or subrogation.

5. Authority: Each of the parties represents, warrants and agrees that it has the full right and authority to enter into this Agreement and that the person executing this Agreement on its behalf has the full right and authority to fully commit and bind such party.

VII.

GENERAL

1. Conditions Precedent to Effectiveness: The parties agree that in the event this Agreement is terminated prior to the filing of the dismissal with prejudice, all of the parties' obligations hereunder (including but not limited to the obligations to grant mutual release) shall be automatically terminated (without the necessity for notice) and shall be of no

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further effect whatsoever.

2. Payment of Litigation and Administrative Costs: The parties agree that each of the parties will bear all of their own fees (including, but not limited to attorney fees) and costs in connection with the Action and with the drafting, execution and implementation of this Agreement.

3. No Admissions: The parties agree and acknowledge that this Agreement represents a settlement of disputed claims and causes of action and that nothing in this Agreement constitutes or shall be construed as an admission of any facts in connection with any claims or causes of action or admission or acknowledgment of the existence of any liability or claim or wrongdoing on the part of any party.

4. Full Integration: This Agreement is the final written expression and the complete and exclusive statement of all of the agreements, conditions, promises representations and covenants between the parties with respect to the subject matter hereof and supersedes all prior or contemporaneous agreements, negotiations, representations, understanding and discussions between and among the parties, their respective representatives and any other person or entity with respect to the subject matter covered herein. Any amendment to this Agreement must be in writing and must specifically refer to this Agreement and must be signed by duly authorized representatives of each of the parties.

5. Survival of Warranties: All representations and

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warranties contained in this Agreement shall survive its execution, effectiveness and delivery. It is expressly understood and agreed by the parties that none of the releases set forth herein are intended to or do release any claims or rights arising out of this Agreement or the breach of it.

6. Benefits, Successors and Assigns: This Agreement shall be binding upon and shall inure to the benefit of each of the parties and each of their respective successors and assigns and each of them.

7. Attorney Fees: In any action brought under or pursuant to any of the terms and conditions of this Agreement, the prevailing party in any such proceeding shall be entitled, in addition to any other relief awarded by the Court, to its reasonable costs and expenses, including its reasonable attorney fees incurred in any such action.

8. Forum Selection: Any and all disputes between the parties which may arise pursuant to this Agreement will be heard and determined before a state court located in Los Angeles County, California.

9. California Law Governs: This Agreement shall be construed and enforced in accordance with and governed by the internal, substantive laws of the State of California.

10. No Presumption From Drafting: Given that all parties have had the opportunity to draft, review and edit the language of this Agreement, no presumption for or against any party

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arising out of drafting all or any part of this Agreement will be applied in any action relating to, connected with or involving this Agreement and each of the parties will be deemed to have participated equally in the drafting of every provision of this Agreement.

11. Notices: All notices under this Agreement will be in writing and will be delivered by personal service or certified mail to such address as may be designated from time to time by the relevant party and which will initially be as set forth below. Any notice sent by certified mail will be deemed to have been given on the fifth day after the date on which it is mailed. All notices given by personal service will be deemed given when received. Notices will be addressed as follows:

a. If to Mancuso:

Mr. Frank Mancuso
c/o Allan J. Abshez, Esq.
Irell & Manella
1800 Avenue of the Stars, Suite 900
Los Angeles, California 90067

b. If to Wildman

Mr. Donohue Wildman
c/o Jonathan Horne

c. If to the Conservancy, the Authority or the Department:

Peter H. Kaufman
Supervising Deputy Attorney General
P.O. Box 85266
San Diego, California 92186-5266

12. Severability: With the exception of the release provisions of this Agreement, if any other provisions of this

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Agreement are found to be unlawful, void or for any other reason unenforceable, such provisions shall be deemed severable from and shall in no way affect the validity or enforceability of, the remaining provisions of this Agreement.

13. Headings: The headings to the paragraphs of this Agreement will not be deemed a part hereof or affect the construction or interpretation of the provisions hereof.

14. Counterparts: This Agreement may be executed in any number of counterparts by the parties and when each party has signed and delivered at least one such counterpart to the other party, each counterpart shall be deemed an original and taken together shall constitute one and the same Agreement that shall be binding and effective as to all of the parties.

IN WITNESS WHEREOF, the parties hereto have approved and executed this Agreement on the dates set forth opposite their respective signatures.

EXECUTED by the parties as follows:

MANCUSO
FRANK MANCUSO, SR.

1997

By: _____
Frank Mancuso, Sr.

CONSERVANCY
STATE COASTAL CONSERVANCY

1997

By: _____
Michael Fischer

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DEPARTMENT
DEPARTMENT OF GENERAL SERVICES

1997

By: _____

AUTHORITY
THE MOUNTAINS RECREATION AND
CONSERVATION AUTHORITY

1997

By:

1997

DONOHUE WILDMAN

By: Donohue Wildman